

Submission  
No 5

## INQUIRY INTO REVIEW OF MEMBERS' CODE OF CONDUCT (2018)

**Organisation:** The Parliamentary Ethics Advisor

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26 October 2018

The Hon. Matthew Mason-Cox, MLC  
Chair, Privileges Committee  
Legislative Council  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

### **Review of Code of Conduct for Members**

I refer to the Committee's request for submissions regarding the inquiry by your Committee into the review of the Code of Conduct for Members as well as the disclosure of pecuniary interests.

#### **Code of Conduct for Members**

I would make the following comments in relation to the Code of Conduct for Members. These comments are similar to those that I have made to the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics.

Paragraph 1 of the Code of Conduct states:

##### **Disclosure of conflict of interest**

- (a) Members of Parliament must take all reasonable steps to declare any conflict of interest between their private financial interests and decisions in which they participate in the execution of their office.
- (b) This may be done through declaring their interests on the Register of Disclosures of the relevant House or through declaring their interest when speaking on the matter in the House or a Committee, or in any other public and appropriate manner.
- (c) A conflict of interest does not exist where the member is only affected as a member of the public or a member of a broad class.

Paragraph 1 (a) and (b) cover conflicts of interests arising in relation to personal financial matters, which is the focus of the pecuniary interests disclosure regime.

The meaning of paragraph 1 (c) is unclear as to whether it is intended to encompass both financial and non-financial conflicts of interest. When read in

conjunction with paragraphs 1 (a) and (b) it appears to me intended to cover conflicts involving personal financial interests and not non-financial interests.

In the debate on the motion for the adoption of a Code of Conduct for Members in May 1998, Mr Nagle, then Chair of the Legislative Assembly Standing Ethics Committee, in moving the motion, stated:

“The provisions in the code dealing with conflicts of interest stipulate that members should prevent their personal financial interest from conflicting with the public interest. The emphasis in these provisions is on a member's individual responsibility to reflect his or her personal circumstances and conflict of interest. Failure to disclose a direct pecuniary interest has long been grounds for disallowing a member's right to vote on a motion or a bill. Transparency of decision making is a check and balance, and an aid to accountability in that the public has a right to know whether there is any circumstance that may improperly influence a member's vote.

The aim of the code is to prevent persons from knowingly making decisions on improper grounds. These provisions interlink with existing regulations and reflect the intent that members should fulfil regulatory requirements in a spirit of compliance with the code, pecuniary interest register and regulations. These clauses incorporate the existing standing order which clarifies that an interest held by a member in common with a general class of citizens, for example, lawyers or wheat farmers, is not prohibited.”<sup>1</sup>

### **An interest as a member of the public or a broad class**

The term “public” or “broad class” is not defined in the Code.

In a joint report on “Managing Conflicts of Interests in the Public Sector”, the Independent Commission Against Corruption and Queensland Crime and Misconduct Commission defined public interest as “the interest of the community as a whole. It is not the sum of individual interests nor the interest of a particular group, but the collective interest of the entire community.”<sup>2</sup>

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<sup>1</sup> LA Debates, 5 May 1998, p 4384

<sup>2</sup> ICAC & QCMC “Managing Conflicts of Interests in the Public Sector – Guidelines”, p. 9

The report went on to state that “[D]etermining the public interest in a particular situation can be complex, even problematic, but on a practical, day-to-day level public officials can best fulfil their public duty to put the public interest first by:

- carrying out their prescribed official duties fully and effectively
- carrying out their official duties within established ethical standards and frameworks
- identifying any actual, perceived or potential conflicts of interest that they have and ensuring these are managed effectively.”<sup>3</sup>

The 2014 NSW Ministerial Code of Conduct, which commenced on 20 September 2014, has a stricter approach to conflicts of interest for Ministers. The Preamble to the Code relevantly provides:

....

11. In particular, Ministers have a responsibility to avoid or otherwise manage appropriately conflicts of interest to ensure the maintenance of both the actuality and appearance of Ministerial integrity.

Other clauses of the Ministerial Code deal with conflict of interest, as follows:

## **6 Duty to act honestly and in the public interest**

A Minister, in the exercise or performance of their official functions, must not act dishonestly, must act only in what they consider to be the public interest, and must not act improperly for their private benefit or for the private benefit of any other person.

## **7 Conflicts of interest**

- (1) A Minister must not knowingly conceal a conflict of interest from the Premier.
- (2) A Minister must not, without the written approval of the Premier, make or participate in the making of any decision or take any other action in relation to a matter in which the Minister is aware they have a conflict of interest.

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<sup>3</sup> Ibid, p. 9

- (3) A conflict of interest arises in relation to a Minister if there is a conflict between the public duty and the private interest of the Minister, in which the Minister's private interest could objectively have the potential to influence the performance of their public duty. Without limiting the above, a Minister is taken to have a conflict of interest in respect of a particular matter on which a decision may be made or other action taken if:
- (a) any of the possible decisions or actions (including a decision to take no action) could reasonably be expected to confer a private benefit on the Minister or a family member of the Minister, and
  - (b) the nature and extent of the interest is such that it could objectively have the potential to influence a Minister in relation to the decision or action.

Part 3, clause 10 of the Schedule to the NSW Ministerial Code of Conduct further provides that a Minister must promptly notify Premier of any conflict of interest that arises in relation to any matter.

Clause 12 of Part 3 provides that a Minister who has a conflict of interest in a matter must abstain from making, or participating in, any decision or from taking, or participating in, any action in relation to the matter, unless the Premier, if satisfied that no conflict of interest arises or that any potential conflict of interest can be appropriately managed, make a ruling authorising the Minister to continue to act.

Clause 13 further provides that a Minister may, if they have some other substantial personal connection with a matter or for any other reason, disclose an interest and abstain from decision-making in relation to a matter in accordance with this Part even if the interest might not comprise a conflict of interest.

Clause 15 also provides that Part 3 does not affect a Minister's duties to avoid, disclose and otherwise appropriately manage actual or perceived conflicts.

There is no similar provision in the Code of Conduct for Members regarding actual or perceived conflicts of interest. While the Code for Members addresses conflicts between a Member's personal and financial or pecuniary interest, it does not address conflicts of interest that could benefit other persons.

## **What is a conflict of interest?**

A conflict of interest can be actual, potential or perceived.

An actual conflict of interest is one where there is a real conflict between a public official's public duties and responsibilities and their private interests.

A potential conflict of interest arises where an official has private interests that could conflict with their public duties.

A perceived conflict of interest can exist where a third party could form the view that private interests could improperly influence the performance of public duties, now or in the future.

A conflict of interest, whether actual, potential or perceived, can involve both financial (pecuniary) and non-financial interests and may arise in a wide variety of circumstances. A non-financial interest is a situation where a person may have a close relationship or involvement with an individual or organisation involved in or affected by a matter. For example, an immediate family member or a close relative or friend may be affected by a decision. A conflict of interest can also arise from involvement with associations, community groups and similar organisations. For example, membership of a sporting association or club may impact on the performance of public duties.

The code of conduct for Members in the Australian Capital Territory, the House of Commons of Canada and the Western Australia Legislative Assembly refer to the private interests of third parties.

The Code of Conduct for Members of the Legislative Assembly for the Australian Capital Territory provides, in relation to conflicts of interest:

“..... Members further undertake that they should:

(10) Actively seek to prevent any conflict of interest, or the perception of such a conflict, arising between their duties as a Member and their personal affairs and interests, take all reasonable steps to resolve any such conflict or perception of a conflict that does arise, and:

.....

(c) disclose in a manner appropriate to the circumstances any other financial or non-financial interest that they may hold, or which they may be reasonably perceived to hold (other than as a member of the

public or of a broad class of persons) which a reasonable observer, informed of that interest, might perceive as giving rise to a conflict of interest with the performance of the Member's duty as a Member."<sup>4</sup>

The [Conflict of Interest Code for Members of the House of Commons](#), Canada,<sup>5</sup> prohibits Members from furthering their private interests or those of their families, or to improperly further the private interests of another person or entity.

Principle 2 (d) to the Code provides that Members are expected:

“(d) to arrange their private affairs so that foreseeable real or apparent conflicts of interest may be prevented from arising, but if such a conflict does arise, to resolve it in a way that protects the public interest; and”

Clause 3 prevents a Member from furthering certain private interests, directly or indirectly, of another person.

Clause 8 provides:

“When performing parliamentary duties and functions, a Member shall not act in any way to further his or her private interests or those of a member of the Member's family, or to improperly further another person's or entity's private interests.

The Code of Ethical Standards for the Queensland Legislative Assembly provides that the purpose of the code is to:

....

- provide an educative tool to assist members manage conflicts of interest and resolve ethical dilemmas; and<sup>6</sup>

Under Part 2, Statement of Fundamental Principles, Member are required to give primacy to the public interest:

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<sup>4</sup> Resolution agreed by the Assembly 25 August 2005, amended 16 August 2006, 24 October 2013

<sup>5</sup> The Code is contained in Appendix I to the Standing Orders.

<sup>6</sup> Part I

## **2. Primacy of the public interest**

Members are elected to act in the public interest and make decisions solely in terms of the public interest. Members also have a continuing duty to declare any private interests relating to their public duties as they arise, and to take steps to avoid, resolve or disclose any conflicts arising in a way that protects the public interest.

Part 5, Resolving Conflicts of Interests, further provides:

“From time to time conflicts of interest arise which are unavoidable.

In keeping with the spirit of the *Code of Ethical Standards*, and the standing orders (and Schedule 2 and the standing orders establishing the members’ interests registers) conflicts of interest are to be resolved in the public interest.”

In Victoria, the Members of Parliament (Register of Interests) Act 1978 contains a code of conduct for Members. Section 3 (1) (a) of the Act provides, *inter alia*:

- (a) Members shall—
  - (i) accept that their prime responsibility is to the performance of their public duty and therefore ensure that this aim is not endangered or subordinated by involvement in conflicting private interests;

The Organisation for Economic Co-operation and Development (OECD) in a 2003 report on Managing Conflict of Interest in the Public Service discusses managing conflicts of interest as follows:

### *“Defining a “conflict of interest”*

Historically, defining the term “conflict of interest” has been the subject of many and varying approaches. As all public officials have legitimate interests which arise out of their capacity as private citizens, conflicts of interest cannot simply be avoided or prohibited, and must be defined, identified, and managed. These Guidelines adopt a definitional approach which is deliberately simple and practical to assist effective identification and management of conflict situations, as follows:



*A “conflict of interest” involves a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities.*

Defined in this way, “conflict of interest” has the same meaning as “actual conflict of interest”. A conflict-of-interest situation can thus be current, or it may be found to have existed at some time in the past. By contrast, an *apparent* conflict of interest can be said to exist where it *appears* that a public official’s private interests could improperly influence the performance of their duties *but this is not in fact the case*. A *potential* conflict arises where a public official has private interests which are such that a conflict of interest would arise if the official were to become involved in relevant (*i.e.* conflicting) official responsibilities in the future.

Where a private interest has *in fact* compromised the proper performance of a public official’s duties, that specific situation is better regarded as an instance of misconduct or “abuse of office”, or even an instance of corruption, rather than as a “conflict of interest”.

In this definition, “private interests” are not limited to financial or pecuniary interests, or those interests which generate a direct personal benefit to the public official. A conflict of interest may involve otherwise legitimate private-capacity activity, personal affiliations and associations, and family interests, if those interests could reasonably be considered likely to influence improperly the official’s performance of their duties.”<sup>7</sup>

The provisions in the Members Code of Conduct relating to non-financial conflicts of interest are unclear and in my view the Code should contain provisions similar to that applying to Ministers for managing conflicts of interest.

This could be achieved by the addition of a paragraph at the end of clause 1, Conflicts of Interest, along the following lines:

(2) Members have a responsibility to avoid or otherwise manage appropriately any actual, perceived or potential conflict of interest with the performance of the duties of the Member in a manner that protects the public interest.

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<sup>7</sup> Managing Conflict of Interest in the Public Service, OECD Guidelines and Overview, 2003 pp 24-25

This would reinforce the Preamble to the Code of Conduct, which states, *inter alia*, “Members of Parliament acknowledge their responsibility to maintain the public trust placed in them by performing their duties with honesty and integrity, respecting the law and the institution of Parliament, and using their influence to advance the common good of the people of New South Wales”.

Finally, for reference and citation purposes I suggest that the various paragraphs of the Code of Conduct should be numbered in a similar manner to Acts and Regulations.

I also feel it would be useful for definitions clause to be added similar to clause 11 of the Ministerial Code.

### **Disclosure of pecuniary interest**

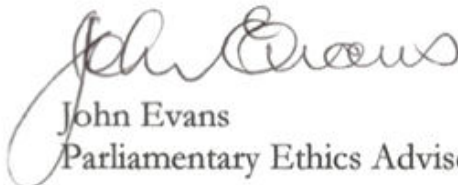
I have been asked on occasion to provide advice to Members on the disclosure of pecuniary interest.

I support previous proposals of the Committee for the disclosure of the pecuniary interests of immediate family, as conflicts of interests do and can arise in relations to those interests.

I also support the proposal for exception reporting – in that a Member makes an initial disclosure following their election and then notifies changes when they occur. Should this occur the publication of the pecuniary interest register on the Internet would be a necessity?

I trust that this will assist the Committee in the review of the Code of Conduct.

Yours faithfully



John Evans  
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